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IN THE

Supreme Court of the United States

October Term 1975

No. 75-1801

THE STATE OF NORTH CAROLINA,
Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION and THE UPJOHN COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Certainly this Court is acting on a matter solely within its discretion whether it grants or denies this Petition for a Writ of Certiorari. Because it is a discretionary review it is required that all parties be carefully accurate in their presentations, as to matters of fact and points of law raised, as an aid to this Court in the exercise of that discretion.

Petitioner's review of Respondents' answering briefs in opposition reveals their responses to contain misstatements of fact and statements containing half-truths to such an extent that a totally distorted picture has been presented.

Petitioner, in an effort to aid this Court in exercising its discretion based upon an accurate understanding as to what has transpired, believes it is incumbent upon it to submit this Reply in an effort to correct the worst of those distortions.

A. ERRONEOUS STATEMENTS BY RESPONDENTS AND REFERENCES TO ACCURATE STATEMENTS ON MATTERS TO WHICH RESPONDENTS REFER.

1. The Collateral Estoppel Question.

Pfizer asserts "The facts as to which petitioner sought to estop Pfizer were not necessary to the determination made by the FTC" and "The FTC did not have direct jurisdiction to determine the issues as to which petitioner sought estoppel" (Pfizer's brief pp. 4, 15-19).

Those statements are false. The truth is found in the following quotations from the opinion of the United States Court of Appeals for the Sixth Circuit in *In the Matter of American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *vacated and remanded sub. nom., American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), 72 F.T.C. 623 (1967), *aff'd sub. nom., Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1968).

That Court said as to "(t)he jurisdiction of the Commission" *id.*, 363 F.2d at 768:

> For the assistance of the Commission on remand we deem it advisable to pass upon two additional issues that are pressed by the petitions to review: (1) whether or not the Commission has jurisdiction; . . . (*id.* 768)
>
> * * * *
>
> The jurisdictional issue may be stated as follows: *Assuming that a patent is obtained by misrepresentation* and improper conduct in the proceedings before the Patent Office, does the Federal Trade Commission have jurisdiction to hold that *the subsequent use of such a patent for the purpose of excluding competition* constitutes an unfair method of competition under Section 5 of the Act . . . (*id.* 768) (emphasis added).

* * * *

Pfizer asserts that the Commission has no jurisdiction to review the proceeding in the Patent Office, to attack indirectly the validity of a patent or to 'second guess the actions of the Patent Office' . . . (*id.*, 769) (emphasis added).

* * * *

The Commission has not ruled that the act of obtaining the tetracycline patent by misrepresentation *as such* constituted a violation of Section 5, but rather that the *subsequent use,* for the purpose of excluding competition, *of a patent so obtained,* constituted such a violation . . . (*id.*, 769) (emphasis added).

* * * *

We hold that the Commission had jurisdiction to determine that the *conduct of the parties before the Patent Office* resulting in the issuance of the patent, *and the subsequent use of the fruits of such conduct may, in total,* be found to constitute a violation of Section 5 of the Act. (*id.*, 771) (emphasis added).

* * * *

We do hold that, in exercising its broad jurisdiction in the enforcement of Section 5 of the Act, *the Commission could explore means and methods employed in obtaining the patents here involved and the subsequent use of the fruits thereof,* assuming the other elements of a Section 5 violation. (*id.*, 772) (emphasis added).

On remand, the Commission stated the issue as to Pfizer's and Cyanamid's conduct before the Patent Office to be:

> . . . (W)hether Pfizer and Cyanamid made misrepresentations to the Patent Office and withheld essential information, thereby deceiving Lidoff into granting a patent which otherwise never would have been approved. (*id.*, 72 F.T.C. at 627).

The Hearing Examiner on remand found the answers to be affirmative as to both Pfizer and Cyanamid, (*id.*, 655). On appeal to the Commission on remand, it affirmed and adopted the findings of the Hearing Examiner on remand as its own, (*id.*, at 694).

The Commission further found as a fact that as to Pfizer, ". . . the Patent Office was kept in the dark by *deliberate* withholding on the part of some Pfizer employee or employees." (*id.* 684), and further

> . . . (W)e conclude that Pfizer failed to abide by the standards of candor and good faith in procuring its patent, and that *this conduct together with the subsequent exploitation* of the tetracycline patent constituted a violation of Section 5 of the . . . Act . . . (emphasis added).
>
> We further find as an alternative ground, that the evidence is clear and convincing that Pfizer committed fraud upon the Patent Office in procuring its patent. Pfizer's subsequent attempt to monopolize the tetracycline market was a violation of Section 2 of the Sherman Act (cite ommitted), and hence of Section 5 of the Federal Trade Commission Act. (*id.*, 684-685).

The Commission further found as a fact that as to Cyanamid:

> In sum, the evidence is clear and convincing that Cyanamid *deliberately* withheld from the Patent Office information which it knew or had reason to believe was relevant to the validity of Pfizer's application for a patent on tetracycline. Cyanamid pursued this course of action with knowledge that it was assured a license in the event a patent on tetracycline issued to Pfizer, and that its position as a leading producer of broad-spectrum antibiotics would be safeguarded because Pfizer had announced its intention that Cyanamid would be the *sole* licensee under any patent that issued. (*id.*, 638) (emphasis added).

As noted by all Respondents in their answering briefs, all other charges against them were dismissed by the Commission for differing reasons. How then, can Pfizer seriously advise this Court *that the finding of* fact of its fraud on the Patent office was not necessary to the *FTC decision?*

On a second appeal to the United States Court of Appeals for the Sixth Circuit, that Court stated:

> The issue now before this Court is whether the findings of fact of the Commissioon are supported by substantial evidence. We answer this question and affirm and enforce the order of the Commission. (401 F. 2d at 578).
>
> * * * *
>
> . . . The basic question is whether Pfizer and Cyanamid made misrepresentations to Lidoff and withheld essential information from him, thereby deceiving him into granting a patent on tetracycline which otherwise would never have been approved. (*id.*, 578)

* * * *

In its opinion on remand the Commission found that in its conduct before the Patent Officer Pfizer failed to abide by the standards of absolute candor and utmost good faith to which applicants and their attorneys must adhere in procuring a patent. The Commission also found that Cyanamid aided Pfizer in its efforts to secure the patent by *deliberately* withholding information which it knew or should have known was relevant to the patentability of tetracycline. The Commission concluded that the withholding of information *together with the cross-licensing agreement* constituted an illegal attempt by Pfizer and Cyanamid to share in an unlawful monopoly which in the light of the subsequent exploitation of the tetracycline patent resulted in a combination in restraint of trade in violation of Section 5 of the Federal Trade Commission Act. (*id.*, at 579-80) (emphasis added).

* * * *

We hold that there is substantial evidence to support the Commission's findings that Pfizer *suppressed* material information . . . We further hold that substantial evidence supports the Commission's conclusion that Pfizer made misrepresentations of material fact and withheld pertinent information, thereby obtaining a patent on tetracycline which otherwise never would have been issued. (*id.*, 583) (emphasis added).

* * * *

Pfizer further contends that even if Lidoff was interested in less than "appreciable" or "recoverable" amounts of tetracycline in

aureomycin broths, he failed to convey his thoughts to Pfizer's representatives and they were not guilty of any misrepresentations. *We hold that substantial evidence supports the Commission's conclusion that the Patent Office records were sufficient to put both Pfizer and Cyanamid's representatives on notice that Lidoff was interested in ascertaining whether any tetracycline was inherently produced in the aureomycin broths, and not ten percent or other "appreciable" or "recoverable" percentages. (id.* 585) (emphasis added).

* * * *

Another argument advanced by Pfizer is that Lidoff's interpretation of patent law as to patentability of an unintentionally produced chemical compound is contrary to the controlling decisions. This is not the question before us. The Commission did not undertake to pass on the validity of the patent, nor do we. (*id.* 585-86)

As to Cyanamid, the Court stated:

> . . . Cyanamid was under the same duty as Pfizer to reveal to the Patent Office information which it had reason to know was material to Pfizer's application . . . Lidoff made specific inquiry of Cyanamid's patent representative in his effort to reach a correct decision as to the novelty of tetracycline. The patent attorney gave an unequivocal answer that no tetracycline was produced in Cyanamid's aureomycin commercial operations or in its aureomycin broths. This reply was erroneous since *tetracycline is and always has been present in aureomycin and is inherently produced in the Duggar and Neider-*

> *corn processes* . . . during the summer of 1954 while the second interference was in progress, Cyanamid's patent representative, in papers filed with the Patent Office continued to deny an inherent production of tetracycline in aureomycin and that 'Cyanamid's knowledge was exactly contrary to its Patent Office statements.' (*id.*, 582-83) (emphasis added).

Petitioner submits this Court should contrast the foregoing findings by the Commission and the United States Court of Appeals with Cyanamid's false statement in its brief that "The Commission's conclusion as to Cyanamid fell short of a finding of knowing and willful fraud . . ." (Cyanamid brief p. 4).

The Commisson found that both Pfizer and Cyanamid's conduct was "deliberate(ly)" (*supra. pp. 4, 5).* According to *Black's Law Dictionary* (Revised Fourth Edition, West Publishing, St. Paul, Minn., 1968) at page 514, DELIBERATELY means "Willfully; with premeditation; intentionally; purposely; in cold blood" while the same authority defines SUPPRESS at page 1608 as "To put a stop to a thing actually existing; to prohibit, put down, to prevent, subdue, or end by force." *Webster's Seventh New Collegiate Dictionary* (G & C Merriam Co., Springfield, Mass. 1963) at page 218 defines DELIBERATE as "1. characterized by or resulting from careful and thorough consideration 2. characterized by awareness of the consequences: WILLFUL."

To read Pfizer's and Cyanamid's briefs in opposition, one would think the prior FTC proceeding against them amounted to nothing more than a Section 5 FTC Act proceeding against a false advertiser, (Pfizer's brief pp. 3, 10-11, and Cyanamid's brief p. 4). Thus Cyanamid's assertion that

> The Commission did hold that respondents Pfizer and Cyanamid had each independently, without conspiracy, employed an unfair

> method of competition by making inadequate disclosure to the Patent Office . . . (and) The Commission's conclusion as to Cyanamid fell short of a finding of knowing and willful fraud.

omits the crucial findings by the Commission and the Court of Appeals as to deliberateness. It omits the crucial language of the Sixth Circuit that ". . . Cyanamid aided Pfizer in its efforts to secure a patent by deliberately withholding information . . . (and) the withholding . . . together with the cross-licensing agreement . . . *resulted in a combination in restraint of trade* . . ." (emphasis added). Certainly, the references cited by Cyanamid on page 4 of their brief not only do not support their statement but in fact contradict it.

Pfizer asserts to this Court "The issue in the FTC proceeding was whether the respondents engaged in unfair methods of competition, in violation of the (FTC) Act; (and) the FTC did not even purport to decide the validity of Pfizer's patent." (Pfizer brief pp. 3, 10-11), but they stated the issue to the Sixth Circuit Court to be

> THE COMMISSION'S FINDINGS OF FRAUD MUST BE, BUT ARE NOT, SUPPORTED BY EVIDENCE WHICH IS "CLEAR, UNEQUIVOCAL AND CONVINCING" (Main Brief of Chas. Pfizer & Co., Inc. in the United States Court of Appeals for the Sixth Circuit, at page 30) (Appendix "E" to Petition, p. E-11).

Pfizer's allusion to the fact the FTC "did not even purport to decide the validity of Pfizer's patent" is strange in its efforts to distinguish the issues in the FTC from those here because the Court below (Fourth Circuit) stated:

> Since the validity *vel non* of the Conover patent was not directly in issue in the proceedings before the Commission, OR IN THE

> COURT BELOW, The precise holdings of *Blonder-Tongue* is not dispositive of the question (of collateral estoppel) raised by plaintiff's motion. (Appendix "A" p. A-18).

Cyanamid even more strangely cites this Court to Judge Wyatt's opinion in the settling cases of *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 741-742 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2nd Cir. 1971), *cert. denied sub. nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971), while contending in this Court the issue decided against it was not fraud. In Judge Wyatt's opinion, he stated at page 741:

> The only findings of misconduct are those by the Commission that Pfizer and Cyanamid each in substance committed a fraud on the Patent Office.

The United States Court of Appeals for the Eighth Circuit stated in *Pfizer v. Lord*, 456 F. 2d 545, 551 (1972) Appendix "B", pp. B-48-49):

> The FTC found that Pfizer and Cyanamid had committed a fraud on the Patent Office in connection with the issuance of a patent.

The District Court for the District of Minnesota, in denying Section 5(a) Clayton Act application to the FTC finding of a violation of the Sherman Act as establishing a prima facie case of a violation of the Sherman Act in this case, during the coordinated multidistrict pre-trial phase of this case specifically noted in its decision (note 10) that:

> The parties have not argued and the Court does not pass on the applicability of the doctrine of collateral estoppel to these cases (Appendix "B" pp. B-28-29).

Petitioner's plea of collateral estoppel was directed and asserted to the fact of fraud and its constituent elements and was asserted against both Pfizer and

Cyanamid as one of the ultimate facts necessary to establish Petitioner's claim for relief under the Sherman Act and was not asserted as establishing the claim itself. The precise language used in the plea is set forth in Paragraph "M" of Petitioner's complaint which is set forth in Appendix "B" at pages B-4-8.

The District Court denied the plea of collateral, as a matter of law, on two specific grounds: (1) the plea was asserted *offensively*, and (2) *in the context of an administrative agency finding of facts.* (Appendix "B" p. B-11). The District Court did not deny estoppel because of lack of identity of issues, Section 5 of the FTC Act, Section 5(a) of the Clayton Act, lack of mutuality of parties, or because of any lack of a "fair opportunity procedurally, substantively and evidentially" of Pfizer and Cyanamid to litigate before the FTC, the issue sought to be estopped. (Appendix "A", p. A-20).

The United States Court of Appeals for the Fourth Circuit disagreed with the District Court that, as a matter of law, estoppel could not be asserted offensively (citing *Graves v. Associated Transport, Inc.*, 344 F. 2d 894, 900 (1965) (Appendix "A" p. A-20), and stated "we are not disposed to hold that an administrative proceeding can never be the basis for a plea of collateral estoppel . . ." (Appendix "A" p. A-21).

What the court below did was to, *sua sponte*, COLLATERALLY ATTACK the fairness of the FTC proceeding as supervised by its sister court for the Sixth Circuit and to which this Court denied certiorari, *In re American Cyanamid, supra.*, 394 U.S. 920 (1968).

As there were no findings made by the District Court as to the matters set forth by this Court in *Blonder-Tongue v. University Foundation*, 402 U.S. 313 (1971) upon which a decision to grant or deny a plea of estoppel must turn; then, upon its disagreement with the District Court that estoppel should not

be denied as a matter of law, the only proper course for the court below was to remand the case to the District Court for hearing and findings as to the facts such as identity of issues, burden of proof, evidentiary rules followed by the prior tribunal, opportunity and incentive of Respondents to litigate the issue, and did they litigate to the finish. Had it done so, it would not have been, like Lidoff, "groping for information" and relying upon the truthfullness of Respondents' representations to make its decision. Hence it would not have found "The Commission did not require that the alleged fraud be demonstrated by clear and convincing evidence." (Appendix "A" p. A-21), because as the Commission's decision clearly shows, it found every essential fact to be proven by "clear and convincing" evidence, *In re American Cyanamid Co., supra.*, 72 F.T.C. 623, 627, 633, 684, 685, 688 (1967).

2. The Conflict Between The Circuits Question.

Pfizer asserts in its brief at pages 3, 6-8, "There is no conflict as to the 'legal interpretation of U.S. Patent Office records, . . .' because the earlier decision of the Sixth Circuit held that those records were insufficient to support a finding of misrepresentation by Pfizer. . . . that a finding of misconduct before the Patent Office could be sustained only on the basis of the . . . testimony of . . . Lidoff. Indeed, counsel for petitioner so acknowledged, as the District Court below noted: 'And with characteristic and commendable candor counsel for plaintiff has conceded that Lidoff's testimony is the *sine qua non* of the plaintiff's charge of FRAUD on the Patent Office' . . ." To like effect see Cyanamid's brief at pages 10-12. Cyanamid further states "Thus there is no basis whatever for petitioner's present contention that Patent Office records are 'determinative' of fraud or that its 'Question A' is presented in this case."

The foregoing statements by Pfizer and Cyanamid are so far out of context as to totally distort the issue.

The truth follows. In the District Court's Memorandum of Decision he stated expressly *what the PIVOTAL QUESTION was* in its determination of the issue of Pfizer's and Cyanamid's fraud. Thus the District Court said:

> . . . (T)he witness (Lidoff) went on to testify that he would have been interested in whether any tetracycline whatever was to be found in the Aureomycin broths. *BUT THE PIVOTAL QUESTION IS WHETHER OR NOT PFIZER'S ATTORNEYS UNDERSTOOD THIS TO BE THE INFORMATION THE EXAMINER WANTED,* and they have testified unequivocally that they did not so understand it. (Appendix "C" pp. 401a-402a) (Emphasis added).

The definition of PIVOT and PIVOTAL are stated in *Websters Seventh New Collegiate Dictionary, supra.*, at page 646:

> PIVOT — 1: a shaft or pin on which something turns; 2: a person, thing, or factor having a major or central role, function or effect 3: the action of pivoting.
>
> * * * *
>
> PIVOTAL — 1: of, relating to, or constituting a pivot 2: vitally important: CRUCIAL

Pfizer's and Cyanamid's defense to the charge of fraud in this case was the same as that in the FTC case. The District Court noted this (Appendix "C" p. 409a) stating:

> . . . Much of the controversy here has swirled around the meaning of (and) . . . the significance to be attached to such words and expressions as 'appreciable', 'recoverable' and 'clearly identifiable.' . . . And having found

> that the evidence, regardless of how the words used by the parties are to be interpreted falls short of establishing fraud, this court declines to enter this semasiological ambiguity.

But the Sixth Circuit held:

> . . . The Patent Office records were sufficient to put both Pfizer's and Cyanamid's representatives ON NOTICE THAT LIDOFF WAS INTERESTED IN ASCERTAINING WHETHER ANY TETRACYCLINE WAS INHERENTLY PRODUCED IN AUREOMYCIN BROTHS, and not ten percent or other "appreciable" or 'recoverable' amounts as now contended . . . *Pfizer v. FTC, supra.*, 401 F. 2d 574, 585).

It is difficult for Petitioner to visualize how a more clear and direct conflict between the circuits could exist as to the sufficiency of a United States record to put a person on notice as to its meaning.

3. The "Newly Developed Evidence Assertions."

Both Pfizer and Cyanamid assert that the result is not inconsistent with the Sixth Circuit because "important, newly developed evidence was presented in the trial below. (Pfizer's brief pp. 3, 8-9 and Cyanamid's brief p. 7). Both are false.

Cyanamid makes its statement and does not cite the Court to what it believes the "new" evidence to be.

Pfizer cites this Court's attention to the evidence which it claims to be "significantly different". Thus, at page 9 of its Brief it refers to the District Court's reliance of "this newly developed evidence . . ." at note 17 of the Court's written opinion, which is found in Appendix "C", at page 395a. It specifically relates to expert opinion testimony as to a matter of *patent law*, to wit:

> "Novelty is not negatived by a prior *accidental occurrence or production*, the character of

> which was not recognized until later . . . and that Lidoff was indeed wrong (in law)."

These experts merely reiterated the same opinion as others of Pfizer's and Cyanamid's experts stated in the FTC case.

On this point of patent law it is Petitioner's contention that as the production of tetracycline was *inherent* in the prior art processes, and not an *accidental occurence*, it is Lidoff who was correct on the law and his citation to *Parke, Davis & Co. v. Mulford*, 189 F. 95 (C.C.S.D.N.Y. 1911) was proper and on point. The *Parke, Davis v. Mulford* case stands for two points of Patent Law. The first is that *inherent* production by a prior chemical process does negative novelty as a general principal of Patent Law. The second point is an *exception* to the general rule. The exception is that the first person who separates an old ingredient from its prior compound may still obtain a patent *provided the newly separated ingredient has a new utility different in kind rather than degree.* The evidence in this case shows that tetracycline had exactly the same utility as aueromycin, but with fewer ill side effects.

Pfizer next cites this Court to Note 22 of the District Court's opinion. Note 22 relates to a Mrs. Wendt's participation in the patent application evaluation.

In 1967, while before the FTC, Pfizer claimed that Mrs. Wendt's participation was newly discovered by it due to Lidoff's testimony there. The Commission noted (72 F.T.C. 623, 678-79):

> We note first of all that the statement by Pfizer's counsel that they did not know of Mrs. Wendt's involvement in this matter until the remand hearing is untrue. The record shows that on December 2, 1959, Dr. Herbert W. Taylor testified at length concerning the patentability report procedure . . . After he

mentioned Mrs. Wendt by name, the following (occurred):

Q. Who was Mrs. Wendt?

A. The examiner in Division 63 . . . I was told by her that she'd written the section of Lidoff's decision on motions . . . that is the inherent production rejection.

Q. You mean the decision of October 14, 1954, in the second intereference proceeding?

A. I do.

That opinion is in evidence as Plaintiff's Exhibit 56, as well as Dr. Taylor's testimony. Pfizer made the same claim of newly discovered evidence in the Fourth Circuit stating: "The(District)Court specifically relied on this newly developed evidence in its opinion."

Petitioner pointed out the error both of Pfizer and the District Court to the Fourth Circuit, noting the foregoing claim of newly discovered evidence was false in 1967, it was false in 1973, it was false in 1975, and it is still false today.

Pfizer further cites to the Bogart-Walsh application as "newly discovered evidence". Bogart-Walsh was Commission Exhibit 13, and is Plaintiff's Exhibit 116.

The District Court was cited to the Bogert-Walsh application as an exhibit in which Pfizer claims they disclosed the fact of inherent production of tetracycline in aureomycin according to the prior cited art set forth in Lidoff's rejection (Duggar and Niedercorn), and the District Court so found (Number 21, Appendix "C" p. 508a):

Not only is Bogert-Walsh not newly developed evidence, this is the exhibit signed by Connoly and Hutz in which they stated on May 2, 1955:

> It is believed that the Patent Office is now aware of the fact that this 'inherent' production of tetracycline by the Duggar process is not in fact true. Tetracycline would most

> emphatically not be an 'impurity' in the prior art methods, as the Examiner believed at the time of his last Office Action herein (which was on November 2, 1954) . . ." (Cf. 72 F.T.C. 681).

It was in November and December, 1954 that Pfizer's same representatives were denying the fact of inherent coproduction of tetracycline in aureomycin following the Duggar and Niedercorn teachings in the Conover tetracycline patent application.

Pfizer suggests that Lidoff has somehow changed his testimony (Pfizer Brief page 8), but like Cyanamid does not identify where in the "more than 11,000 pages of transcript" he did so, thus inviting the Court to embark on a voyage of discovery through the record to determine if their statements are true or false. But such a voyage is not necessary as the following shows.

Lidoff's testimony on these crucial questions did not change on iota in this case. In fact, as to those questions in his last testimony, he testified regarding his recollection *vis* reconstruction (Tr. p. 4138):

Q. Now, as I understand your prior testimony, am I correct that you are unable to recall at this time any of the words that you used or that Mr. Hutz or Dr. Murphy used in the interviews pertaining to the Conover application?

A. Yes, I am unable to recall those words.

Q. Am I correct that the best you are able to do in that regard is to reconstruct what information you believe you were interested in based in turn on what you then understood the principles of the patentability to be?

A. I can make it stronger than that. Based on the records I know what I was interested in. There is no question in my mind what I was interested in.

The only "newly discovered" evidence as to Lidoff comes from a recorded *ex parte* discussion on January 21, 1960 between Lidoff and the Commissioner of Patents on the same questions asked in this and the FTC case (PLX 1001) and his answers were the same on all three occasions; and, the exhibits referred to in the Petition at page 23. None are exculpatory.

Lidoff testified that appreciable has two meanings, one meaning "sufficient to be noticed" as was used in context in the Conover tetracycline product application, and a secondary meaning of "substantial or large quantity" as used in the context of the Bogert-Walsh separation of compounds process application.

Lidoff merely testified as to what is in every dictionary of the English language.

Regardless, the District Court declined to enter a finding with regard to the meaning of appreciable as used in either sense, noting:

> " . . . this court declines to enter this thicket of semasiological ambiguity" (Appendix "C", p. 409a).

For an example of some of the internal inconsistencies (Petitioner's Question "F") of the District Court's decision, this Court may wish to compare the District Court's own language regarding "appreciable", "recoverable", and etc., in Appendix "C" (at page 409a) with some of its adopted findings set forth as numbers 46-48 at Appendix "C", (pages 520a-21a).

4. Respondent's Assertions Regarding Petitioner's Concession.

Both Pfizer and Cyanamid quote a passage from the transcript between the District Court and Petitioner's counsel (Pfizer brief pp. 7-8; Cyanamid's brief pp. 11-12). Both Pfizer and Cyanamid cite the passage for the proposition that Petitioner has conceded away the very question it raises in Question "A" of its petition. E.g., immediately following the quote, Cyanamid claims "Thus, there is no basis whatever for petitioner's present contention that Patent Office records are "determinative' of fraud or that its 'Question A' is presented in this case. Cyanamid omits the preface to the colloquy. That omission states precisely what the concession relates to:

> And with characteristic and commendable candor, counsel for plaintiff has conceded that Lidoff's testimony is the *sine qua non* of plaintiff's charge of FRAUD on the Patent Office.

The point raised in the petition goes not to the adequacy of the Patent Office records to prove *fraud.* It goes to the adequacy of the Patent Office records to put Pfizer and Cyanamid *on notice to make a full disclosure in accordance with their uncompromising duty to the Patent Office* (See Point 2, *supra.*, pp. 12-14). and the opinion of the court below, Appendix A, pp. A-15-16).

Fraud, which is the question to which Petitioner's concession relates, consists of several elements. In some of the elements, the focus of inquiry is upon the representor of facts, such as did he communicate the false data to the representee, did he know the data to be false, or alternatively, did he make the statements with reckless disregard as to the truth or falsity of the representation made, did he intend for the representee to rely upon them, did he know or should he have known the representee considered the data material. As to the other elements, the focus of inquiry is upon the representee, such as his knowledge of the facts, materiality, reasonable reliance, and change of position. It is these elements to which Petitioner's concession as to the necessity of Lidoff's testimony was made. It is these latter elements to which the Sixth Circuit directed its questions to Lidoff on remand of the case, *American Cyanamid v. FTC,* 363 F.2d 757, 777-778 (6th Cir. 1966).

When Pfizer petitioned this Court to review the Sixth Circuit's decision in 1968 (No. 1019), the Solicitor General of the United States filed a brief in opposition for the Federal Trade Commission. He stated in his brief at pages 13-15 the issues to which Lidoff's testimony related:

> In its first opinion, the court of appeals, after a painstaking review of the record as it then stood, concluded that the ultimate questions of whether the patent examiner received all the information he sought, and whether he was deceived into granting the patent, could not be answered without the testimony as to his knowledge, attitudes, and intentions at that time. The court propounded a list of subsidiary questions, as to which sharp disagreement was evident between the Commission and its hearing examiner, and which the court considered material to resolution of the ultimate question (fraud). On remand, Lidoff testified fully on the disputed issues, and was expressly asked the questions the court had listed as crucial.
>
> * * * *
>
> Although it was (Pfizer) that initially insisted that Lidoff's testimony was essential to resolution of the patent issue,* it now argues that such testimony should have been neither admitted nor relied upon . . .

*Pfizer, having first contended that the issue of unfair and inequitable conduct before the Patent Office could not be resolved without Lidoff's testimony, should not be heard to claim now that admission of this testimony offends the rule of *Morgan v. United States*, 313 U.S. 409 . . . In any event that principle is not apposite here . . . It is surely not the law that one charged with securing favorable action by inequitable conduct or fraud is immune from testimony by the official concerned as to the materiality of information given or withheld from him. The factors influencing the decision of the official are peculiarly within his knowledge; he is the best witness as to the materiality of information concealed, and his testimony is thus relevant to test the regularity of the administrative proceedings. (cites ommitted).

5. Assertions Re The Issues In The FTC Vis This Case.

Contrary to all Respondents' suggestions, Petitioner did not merely recast the antitrust issues here to be the same as in the FTC case or in the indictment in the criminal case. Reproduced and attached hereto as Supplemental Appendix "K", for vertification of this fact, are pertinent parts of Petitioner's Answers to Respondents' Interrogatories filed in this action on May 23, 1973. Also reproduced and affixed hereto as Supplemental Appendix "L" are the pertinent parts of the FTC decision relating to the charges made and dismissed in that case, together with the reasons therefor.

Perusal of these appendices shows that Petitioner charged that two separate and distinct illegal agreements, partly express and partly implied, were entered into, the first between Pfizer and Cyanamid, the second between Bristol, Squibb and Upjohn.

It is charged Pfizer and Cyanamid entered into illegal agreements in violation of the Sherman Act no later than November 1953, the terms of which were, *inter alia:* (1) to procure a patent on tetracycline, with a cross-license arrangement, taking "*all steps necessary*" to procure the patent; (2) to exclude competitors from the tetracycline market; and (3) to fix and maintain prices at the then current prices of aureomycin (Appendix K, pp. K-1, K-2).

In contrast, the FTC charged a three-way conspiracy between Pfizer, Cyanamid *and Bristol* to *defraud the Patent Office.* This charge was dismissed by the FTC as not proven (Appendix "L", pp. L-1, L-2). No similar charge was made in this case. The FTC also charged a five-way express conspiracy between all five Respondents *to exclude competitors.* This charge was also dismissed by the FTC (Appendix "L", pp. L-2, L-3), and no such charge was made in this case (Appendix "K").

Petitioner charged that Bristol, Squibb and Upjohn entered into illegal agreements, partly express and partly implied, in violation of the Sherman Act, no later than September 1954, whose terms, *inter alia*, were: Bristol agreed to limit its bulk customers to Squibb and Upjohn, who, in consideration therefor, agreed to purchase their entire requirements of tetracycline from Bristol, and to fix and maintain their tetracycline prices at the then existing tetracycline-aureomycin prices of Pfizer and Cyanamid (App. K, p. K-2). No like charge was made by either the FTC or in the indictment in the criminal case.

For the first time, the entire course of these Respondents' conduct regarding tetracycline from 1953-1966 was placed at issue, tried and decided in this case.

Except as to the issue of patent fraud, all other final dispositions have been inconclusive. A jury convicted, but Judge Canella, in the criminal case on remand, entered a verdict of not guilty because of the heavy burden of proof. He stated:

> "The reasonable doubt standard is a constitutional precept in criminal prosecutions (cite omitted) . . . The court is not convinced beyond a reasonable doubt that the defendants are guilty of the crimes of which they stand accused." *Unied States v. Chas. Pfizer Co., Inc.*, 367 F. Supp. 91, (S.D.N.Y. 1973).

The FTC first found Respondents had conspired to fix prices (App. L, p. L-2), then on remand voted 2-2 not to answer the issue presented because price competition had developed in the market after 1966 (App. L, pp. L-2-4).

6. Assertions Re The Criminal Case Vis This Case.

The following illustrations demonstrate the erroneousness of Respondents' suggestions that previously the same charges tried in this case were tried in criminal court. Therefore, they suggest, there is no substantial antitrust issue involved in this case worthy of this Court's attention.

The truth is that in the criminal trial: Pfizer's and Cyanamid's fraud on the Patent Office; Bristol's, Squibb's and Upjohn's conduct prior to December 1955; and, Pfizer's, Bristol's, Squibb's and Upjohn's restrictive licenses were not placed at issue. See paragraphs 7 and 16 of the Bill of Particulars filed in that case (Supplemental Appendix "M", pp. M-1-M-3). The government's attorney expressly stated, in summing up: ". . . until the time 'Bristol' made that deal with (Pfizer) in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal." *United States v. Chas. Pfizer & Co., Inc.*, 426 F 2d 32, 45, (2nd Cir. 1970), *modified and rehearing en banc denied*, 437 F 2d 957 (2nd Cir. 1970) *aff'd by equally divided court*, 404 U.S. 548 (1972), *on remand* 367 F. Supp. 91 (S.D.N.Y. 1973)

Thus, on a more limited case and evidence, three of the six justices of this Court, sitting on that case, voted to reverse the Second Circuit and reinstate the criminal conviction. *United States v. Pfizer, et al*, 404 U.S. 548 (1972).

In this civil case, not only were the same issues of Respondents' agreements of 1953 and 1955 at issue, as in the criminal case, but so were the issues of Pfizer's and Cyanamid's fraud on the Patent Office, Bristol's, Squibb's and Upjohn's agreements of September 1954, as well as the legality of the restrictive license agreements of December 1955 between Pfizer, Bristol, Squibb and Upjohn and the evidence carried through 1966.

7. Other Incorrect Statements of Respondents.

There are other statements by Respondents which are literally untrue or misleading, but they are too numerous to set forth and answer accurately in detail. Examples are Cyanamid's statement that Petitioner's

case against Cyanamid " . . . was brought and tried entirely on charges that they had conspired together in violation of the antitrust laws." Certainly that is what the claim for relief was based upon. But the District Court in its memorandum of decision, correctly noted (Appendix "C", at p. 391a):

> The plaintiff has placed great reliance on the charge that Pfizer and Cyanamid practiced fraud on the Patent Office in obtaining the issuance of the Conover patent on tetracycline . . .

Respondent Cyanamid at page 20 of its brief appears to suggest the "period under consideration" in this case was 1953-1961 because of an obvious typographical error in the District Court's memorandum of decision at Appendix C, p. 422a, and omits the transitional language of the District Court to Parke, Davis's so-called "parallel pricing actions" spoken of at Appendix C, p. 424a.

If the District Court did mean to consider only the period through 1961 of Parke, Davis's pricing actions as "strong evidence that no conspiracy existed" (App. C, 424a), then its statements that it considered collectively all other evidence in the record (App. C, p. 416a) is incorrect. Either way, there is an inherent conflict in those findings.

The period under consideration in this case commenced about October-November 1953 and continued through November 1966, a thirteen year period and it is disingenuous to suggest otherwise.

Cyanamid claims that Petitioner is complaining about "monumental . . . discovery" (Cyanamid br. p. 8.) Nevermind that Cyanamid omits by its ". . . ." petitioner's reference to "pre-trial delays" which were occasioned by Respondent's repeated applications for extraordinary writs during pre-trial proceedings on the issue of standing, again on class action, again on

transfer of the cases, again on discovery (twice), and again to recuse the transferee judge. That is not the cause of Petitioner's complaint to this Court. We noted that we survived those tactics. And having survived them, Petitioner believes that its action should be decided by applying appropriate and applicable principles of antitrust law. The Courts below having failed to do so, Petitioner has no recourse but to petition this Court.

In doing so, Petitioner has not asked this Court to conduct a trial de novo as Respondents suggest nor has Petitioner ever claimed that negligence of respondents in the Patent Office "should be held to constitute a violation of the antitrust laws." (Cyanamid's br. p. 17). Such statements are ludicrous as well as false.

In the closing argument, the following colloquy occurred between Petitioner's counsel and the trial judge (Tr. pp. 11017-11024):

> THE COURT: What do you say as to the quantum of proof necessary . . . (does) . . . clear, cogent and convincing proof appl(y)?
>
> MR BENOY: We don't argue that . . . Yes, sir.
>
> THE COURT: All right, that answers that.
>
> MR. BENOY: But it doesn't stop right there. When you talk about quantum or proof . . . necessary to meet that clear, cogent and convincing, varies with the circumstances as to when you reach it. For example, take the lawyer-client relationship . . . When you have (that) relationship . . . you meet your burden of proof when you prove the . . . relationship, the transaction (between the lawyer and client) and the financial advantage to the lawyer . . . Then you move down a little bit in the standards. Here we have what is the stan-

dard in the relationship of a patent applicant in the patent office . . . a confidential relationship and owes the obligation of frank and truthful statements . . . Candor is required . . . There is an absolute duty of disclosure . . .

MR. BENOY: Now, as to the standard of proof, clear, cogent and convincing, I ANALOGIZE IT IN MY OWN MIND TO YOUR NEGLIGENCE CASES . . . When you have a high duty of care owed it takes far less to prove negligence than when you have (the standard) of ordinary care owed. But what first must be analyzed is what is the duty owed to determine when the standard of proof has been met . . . There is the high degree of care owed. You meet your standard of proof with less evidence than you do with the ordinary duty owed. If you have a slight degree of care owed . . . then it takes even greater evidence to meet the standard of proof . . .

So in analyzing here, when does the plaintiff meet its burden of clear, unequivocal and convincing . . . we must (first analyze) what was the duty owed by the person charged with fraud.

THE COURT: You say it was so high in this case that only slight evidence would be sufficient to carry the clear, cogent and convincing burden?

MR. BENOY: Yes, Your Honor . . .

There has never been any other reference made by Petitioner's counsel as to negligence in reference to this case any where, at any time. This points up one of the subsidiary problems involved in the errors committed by the courts below. They have accepted Respondents' characterizations of both the issues and the evidence instead of the evidence introduced and the issues raised.

This is best illustrated by the Court of Appeals statement that "North Carolina's appeal presents two issues . . ." (Appendix "A", p. A-5), contrasted with the Questions on Appeal stated (Appendix "H", p. H-6) briefed (Appendix "H", pp. H-4-5) and argued on appeal.

B. THE REASONS FOR GRANTING THE WRIT ARE SET FORTH IN THE PETITION AND PETITIONER RELIES UPON THEM.

Cyanamid claims that Petitioner ". . . approaches this Court with an extended but highly selective recital of the evidence, which omits substantially all of the evidence favorable to respondents that the District Court found convincing." (Cyanamid brief pp. 8-9).

Petitioner's Question "E" relates to the failure of the courts below to appiy the proper standard of law in determining whether an "agreement" or "understanding" has resulted from these Respondents joint efforts in the market.

The District Court looked to the denials of the principals involved in determining what was convincing and hardly alluded to what Respondent's actually did. Thus we find the District Court stating: (Appendix "C", p. 387a):

> On the contrary, the four principals who participated in the meetings have given consistent and convincing testimony in this and the prior cases that no such agreements were made.

This Court has stated in *United States v. Parke, Davis and Co.*, 363 U.S. 29, 44 (1960):

> . . . whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.

The evidence which was set forth in the petition was skeletal only, and was necessary to show what the parties did as opposed to what they said they did.

Bristol, Squibb and Upjohn's brief stating that this Court's "two court rule" requires the petition be denied is a non-sequitur, and no reply is necessary to such.

C. THE RECENT DECISIONS OF THE EIGHTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT OF MINNESOTA RELATING TO THE UNITED STATES', THE COMPETITOR'S, AND THE FOREIGN GOVERNMENT'S CASES DEMONSTRATE THE DESIRABILITY OF A FINAL AUTHORITATIVE STATEMENT BY THIS COURT AS TO THE PROPER STANDARDS OF LAW TO BE APPLIED IN THIS AND THOSE CASES.

The U.S. Court of Appeals for the Eighth Circuit has just recently (August 2, 1976) had further occasion to examine the on-going trials of the *United States v. (these Respondents)* and its opinion has been reproduced and attached hereto as Appendix "N".

Subsequent to that decision, the District Court declared a mistrial (Appendix "O"). The so called competitor cases have still another patent fraud charge pending against Pfizer on yet another broad spectrum antibiotic drug which must be tried; and the Eighth Circuit *en banc* has affirmed the standing of foreign governments to sue these same Respondents in the District Court of Minesota, (Appendix "P"), on some of the same acts and practices involved here.

As Judge Lord noted in declaring a mistrial, he could see "no end in sight" to the trial (Appendix "O" p. O-2) and he further noted that if other State plaintiff's had not settled "the court believes that it would be faced with the possibility of at least five more years of trials" (Appendix "O" p. O-3). With the Eighth Circuit's decision that foreign governments have standing to sue these Respondent's (Appendix "P" p. P-1), that possibility looms again.

Surely, after tying up the United States Courts for more than twenty years, it is time for this Court to speak finally and authoritatively on the issues set forth in the Petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

CONCLUSION

Petitioner, for the reasons set forth in its petition prays this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision in this case.

Respectfully submitted,

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Dated: September 24, 1976

CERTIFICATE OF SERVICE

The undersigned, Jean A. Benoy, hereby certifies: that he is a Deputy Attorney General of North Carolina, licensed to practice law in the Supreme Court of North Carolina and in the United States Supreme Court.

That on September 24, 1976, he served all parties required to be served, by depositing three (3) copies of the foregoing Reply, in a United States Post Office, with Air Mail postage prepaid, properly addressed to Counsel of Record for the respective parties at their post office addresses as follows:

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APPENDIX K

EXCERPTS FROM PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES "GENERAL SET NO. 1".

DEFINITIONS

(a) "PTB" - Plaintiff's Trial Brief dated August 9, 1972.

(g) "Communicate -ed -ing -tion" - includes oral, written, non-verbal and non-written means of communication. By the latter, plaintiff includes the knowing wink, the shrug of a shoulder, the wave of a hand, the nodding of the head, the facial grimace, and all other forms of non-verbal communication. It also includes the use of code words and phrases where one set of words and phrases are expressed to convey other primary thoughts, concepts, meanings and understandings.

(h) "The first scheme" - means the understandings reached between Pfizer and Cyanamid in late 1953, the essence of which was to: (1) maintain the existing prices in the BSA market; (2) fix the prices of tetracycline at the current BSA market prices; (3) prevent the institution of price reductions in the broad-spectrum antibiotic market with the impending introduction of tetracycline; (4) divide the tetracycline market between them; (5) foreclose market entry of other tetracycline producers and sellers; (6) take all

necessary steps to cause the early issuance of a patent on tetracycline to one of them; (7) provide for the issuance of a license from the grantee of such patent to the other one; (8) have Cyanamid grant a license to Pfizer; and (9) have Cyanamid sell Pfizer sufficient quantity of bulk tetracycline to enable Pfizer to gain immediate entry into the tetracycline market.

(i) "The second scheme" - means the understandings reached during late summer or early fall of 1954 between Bristol, Squibb and Upjohn, the essence of which was to: (1) gain entry into the broad-spectrum antibiotic market as quickly as possible through selling tetracycline; (2) sell at substantially identical prices to the then prevailing broad-spectrum antibiotic market prices; (3) have Bristol be the bulk producer of tetracycline and to sell in bulk to Squibb and Upjohn and to no others with Squibb and Upjohn to refrain from producing tetracycline; (4) acquire licenses, if possible, from Cyanamid and Pfizer as a means of market entry and if not possible, as a fallback position; (5) establish through litigation that Cyanamid's patents on Aureomycin, and any patent which may issue on tetracycline to Pfizer or Cyanamid, was unenforceable and constituted no bar to Bristol, Squibb and Upjohn producing or selling tetracycline.

I. INTERROGATORIES, GENERAL SET NO. 1

INTERROGATORY NO. A. 1

State whether the allegations of fact and law with respect to the conspiracy you charge differ from the allegations with respect to the conspiracy charged in the indictment in United States v. Chas. Pfizer & Co., Inc., et al. (S.D.N.Y., 61 Cr. 772) (hereinafter "the Criminal Case") instituted on August 17, 1961 and as particularized by the government's Bill of Particulars, dated October 17, 1962, in that action, and, if so, specify each allegation of fact and law you charge which so differs from the allegations made in the Criminal Case.

ANSWER TO INTERROGATORY NO. A. 1

Yes, partially. The allegations of fact and law upon which plaintiff relies are set forth fully in PTB, at pages 1, 2, 5-14, and 14-19, line 2. To the extent the Government's charges differ from those statements in PTB, the statement in the PTB controls.

INTERROGATORY NO. A. 2

State the date you claim the alleged conspiracy was initiated, identify each person you claim participated or engaged in the alleged conspiracy, and the date when each such person allegedly entered or joined the conspiracy.

ANSWER TO INTERROGATORY NO. A. 2

The exact date is unknown to plaintiff. Plaintiff alleges it was initiated for some period of days or weeks prior to the first meeting of Malcolm and McKeen during the first week of November 1953.

INTERROGATORY NO. A. 4

State whether you claim that the alleged conspiracy was express, implied, or partly express and partly implied.

ANSWER TO INTERROGATORY NO. A. 4

Partly express and partly implied.

INTERROGATORY NO. D. 1

As to each such patent and each claim thereof, state the grounds on which your charge of patent invalidity or unenforceability is based.

ANSWER TO INTERROGATORY NO. D. 1

The Conover patent because it was obtained through the methods set forth in the FTC case.

INTERROGATORY NO. D. 2

State whether you claim that any alleged conspirator had knowledge of such alleged invalidity or unenforceability; give the name of such alleged conspirator, and if a corporation is named, the name or names of its officers or agents who are claimed to have had such knowledge and the earliest date with respect to such person or corporation when such knowledge is claimed to

have existed and the asserted ground for such invalidity or unenforceability.

ANSWER TO INTERROGATORY NO. D. 2

Yes. Pfizer and Cyanamid no later than November 1953 as to the unenforceability of: the Duggar and Niedercorn patents on Aureomycin because of Cyanamid's acquisition of the Minieri patent application; and the probable unenforceability of any patent on tetracycline because of the highly questionable legal case for a valid patent to issue in the first instance on the grounds set forth in the patent examiner's initial rejection of Pfizer's and Cyanamid's applications for a patent thereon. By February, 1954 Pfizer and Cyanamid each knew, or had reason to know, that no patent was likely to issue to anyone on tetracycline before years of prosecuting their claims on tetracycline through the administrative appeals route in the patent office and ultimately to the courts.

By October, 1954, Pfizer and Cyanamid knew for a fact that no enforceable patent was likely to issue on tetracycline in the immediate or mediate future.

By the fall of 1954, Bristol, Squibb and Upjohn each knew or had reason to believe that no enforceable patent was likely to issue on tetracycline in the immediate or mediate future because of the patent examiner's dissolution of the second interference and the grounds therefor.

By December, 1955, Bristol, Squibb and Upjohn knew for a fact that Pfizer could not enforce its patent on tetracycline because of the knowledge they had gained through discovery proceedings in actions

inter sese; and because of Pfizer's unequitable conduct in the Broady wiretap incident.

INTERROGATORY NO. E. 1

As to each such agreement or understanding you claim existed, specify the parties to the agreement or understanding and state whether such agreement or understanding was oral or written, or partly oral and partly written; to the extent written, identify all documents constituting such writing; to the extent oral, state the substance thereof, by whom and to whom spoken and the time and place of each conversation.

ANSWER TO INTERROGATORY NO. E. 1

The first scheme was entered into between Pfizer and Cyanamid in October and November, 1953. The final terms of the scheme were communicated to each other at the meeting between Malcolm and McKeen on or about November 5, 1953 and agreements as to those terms were reached at that time. Part of the terms were subsequently reduced to writing, while part of the terms remained unwritten.

Malcolm on behalf of Cyanamid and McKeen on behalf of Pfizer made, and communicated to the other, the agreements. They left it to their respective subordinates to implement the details of the scheme.

The second scheme was entered into between Bristol, Squibb and Upjohn in the late summer and early fall of 1954. The final terms of the scheme were communicated to each other at meetings and via

telephone through Schwartz on behalf of Bristol, Leppart and Touhy on behalf of Squibb, and Gilmore on behalf of Upjohn, and agreements as to those terms were reached during this period of time. Part of the terms were subsequently reduced to writing while part of the terms remained unwritten.

Schwartz of Bristol, Leppart and Touhy of Squibb and Gilmore of Upjohn made and communicated the agreements to the others. They left it to their respective subordinates to implement the details of the scheme.

In December, 1955, Bristol, Squibb and Upjohn were ultimately successful in acquiring licenses necessary to implement and enjoy the fruits of the second scheme and thus joined the combination and conspiracy of Pfizer and Cyanamid.

APPENDIX "L"

EXCERPTS FROM FTC DECISIONS *In Re American Cyanamid et. al* 63 F.T.C. 1747 (1963) and 72 F.T.C. 623 (1967).

(63 F.T.C. 1862)

* * * *

XI

ALLEGED CONSPIRACY BEFORE THE PATENT OFFICE

Complaint counsel contend that the evidence of record sustains the charge that Cyanamid, Pfizer and Bristol entered into an agreement or conspiracy to obtain a patent on tetracycline by fraud. The record does show that each of these respondents withheld information from the Patent Office concerning inherent production of tetracycline with Aureomycin. There is no evidence, however, that Bristol did this by agreement or had knowledge that the others were withholding information or were intentionally making false statements. As to Pfizer and Cyanamid, there are circumstances disclosed by the record which point to a possible conspiracy to suppress information concerning inherent production of tetracycline.

Although these circumstances *standing alone* might constitute sufficient evidence to find that a conspiracy existed between Pfizer and Cyanamid, weighing all the evidence of record we do not find that complaint counsel has met the burden of proving this charge by substantial, reliable and probative evidence on the record as a whole. We wish to make it clear, however, that we are not finding that the evidence spells out an absence of a conspiracy, but merely that the evidence is inconclusive on this issue. The hearing examiner's conclusion that there was no conspiracy to defraud the Patent Office is based upon an erroneous finding that there was no withholding of information and no misrepresentation by any of the parties. We are in complete disagreement, therefore, with that part of the initial decision dealing with this subject and it is rejected.

XII
ALLEGED CONSPIRACY TO EXCLUDE OTHERS

We are also of the opinion that the evidence falls short of establishing an agreement among all ~~five~~ five respondents to exclude competitors from the broad spectrum antibiotic market. Prior to the settlement of the tetracycline patent infringement suit an agreement would hardly have been consistent with the obvious efforts of Pfizer to exclude Bristol, Squibb and Upjohn. After this suit was settled each of the respondents undoubtedly realized that there would be no new entries in the tetracycline market. There is insufficient evidence, however, to prove that they expressly agreed among themselves to exclude others. The record shows, in this connection, that each of the respondents individually desired to exclude additional competitors in the sale of tetracycline. After the settlement of the aforementioned suit an agreement among them to foreclose market entry by other competitors was probably unnecessary.

* * * *

(1866)

XIII
THE PRICING PRACTICES CHARGE

We now turn to the charge that the respondents engaged in illegal pricing practices. The facts establish (1) that all respondents, Pfizer, Bristol, Squibb, Upjohn and Cyanamid, conspired with one another to fix and stabilize tetracycline prices.

* * * *

AMERICAN CYANAMID CO. ET AL.
(72 F.T.C. 623, 689 (1967)
Opinion

The Price-Fixing Charge

In its first decision, the Commission found that respondents had unlawfully agreed to hold the price of

tetracycline at the same level as that maintained for the other so-called broad-spectrum antibiotics since 1951. The Commission entered an order on August 8, 1963, requiring respondents to cease and desist from future price fixing and directed them to establish, independently, new prices for their respective tetracycline products.

Subsequent to the Commission's order of December 17, 1963, which directed Pfizer and Cyanamid to license any qualified applicant under their respective patents for the manufacture or sale of tetracycline, new firms entered the field, although not licensed by Pfizer and Cyanamid. *American Cyanamid Company v. Federal Trade Commission,* 363 F. 2d 757, 817; *McKesson & Robbins, Inc. v. Chas. Pfizer & Co., Inc. and American Cyanamid Co.,* 235 F. Supp. 743 (E.D. Pa. 1964). And while the evidence in the record is limited to the period prior to July 28, 1958, current reports indicate that the price of tetracycline has declined substantially.

Pfizer represents in its brief that bid prices to hospitals have moved downward to levels of less than one-fourth of the 1958 bid prices and that list prices in the prescription market have also fallen. According to this respondent, the price to the retailer of one bottle of 100 capsules (250 mg.), which the record shows was $30.60 in 1958, is now listed by Cyanamid at $11.22, and other competitors of Pfizer sell at even lower "effective" prices. In the face of these developments, it is not unreasonable to assume that prices will tend to be still more competitive once the Commission's licensing order goes into effect.

Mindful that the goal of its order is to remove unlawful restraints and foster future competitive conditions rather than punish for past conduct, two of the four participating members of the Commission (Commissioners Reilly and Elman) believe that the public interest will be adequately served by compulsory

licensing and by continued close scrutiny of Pfizer's and Cyanamid's readiness to license others to make and sell tetracycline. In the view of these members, it is now unnecessary to decide whether the uniformity of prices in the 1950's was the result of a price-fixing conspiracy as contended by complaint counsel or the product of conscious parallelism as respondents seem to suggest. On the other hand, the other two participating members of the Commission (Commissioners MacIntyre and Jones) believe that the evidence of record amply substantiates the allegations in the complaint relating to price fixing. In the view of these two members, the Commission should adhere to and renew the findings of fact and conclusion of law, and issue the order to cease and desist, relating to the price fixing phase of the case, which were contained in the Commission's previous decision of August 8, 1963. Since there is not a majority of the participating Commissioners favoring such action, however, the portion of the complaint which charges respondents with fixing prices must be dismissed.

APPENDIX M

Excerpts from Bill of Particulars filed by the United States in U.S. v. Chas. Pfizer & Co., Inc., et al, 61 Cr. 772 (S.D.N.Y.).

Order of Ryan, Jr., dated 7/11/62, Granting in Part and Denying in Part Defendants' Motion for a Bill of Particulars.

7. State whether it is claimed that the terms of any written agreement or combination of written agreements are unlawful without reference to other facts. If so, identify each such written agreement or combination of written agreements and the allegedly unlawful terms thereof.

12. Specify by what actions or steps taken by Cyanamid or refrained from by Cyanamid, it is claimed to have assisted or cooperated with Pfizer in obtaining a patent on tetracycline for Pfizer. State if it is claimed by the Government that such actions or steps, or failure to act were done or refrained from under the terms of the conspiracy alleged in the indictment; and if so, furnish the particulars required by paragraphs 5 and 6 of this Order with respect thereto.

16. State whether it is claimed that Pfizer's tetracycline patent or any claim thereof is invalid or unenforceable, and if so, identify the claims of the patent which are claimed to be invalid or unenforceable; state the grounds on which such claim of invalidity or unenforceability is based, the name of each defendant

or co-conspirator or officer, agent or employee thereof who is claimed to have had knowledge of such invalidity or unenforceability and the earliest date when such person is claimed to have had such knowledge.

Bill of Particulars, dated 10/17/62

7. The Government does not claim that any of the written agreements or any combination thereof which will be offered in evidence are unlawful without reference to other facts.

12. The Government claims that Cyanamid assisted Pfizer in obtaining a patent on tetracycline for Pfizer by:

(a) Orally agreeing with Pfizer, in about November 1953, inter alia, to exchange proofs of priority, with the loser to file a concession of priority in the Patent Office, and the eventual patentee to license the other party ot manufacture, use and sell tetracycline;

(b) Entering into written agreements embodying the terms of said oral agreement;

(c) Orally agreeing with Pfizer, in about November 1953, to [R. 6863] supply bulk tetracycline to Pfizer;

(d) Exchanging proofs of priority of invention with Pfizer;

(e) Filing a concession of priority to Pfizer in the Patent Office.

(f) Abandoning the product claims in its Minieri application;

(g) Having itself included in the second interference, declared March 2, 1954 by the Patent Office;

(h) Moving to dissolve said interference as to Bristol and to set up a separate one between Cyanamid and Bristol;

(i) Concurring, in its briefs, with Pfizer in its opposition to Bristol's application;

(j) Joining with Pfizer in opposing Bristol's application for extensions of time in the course of the second interference;

(k) Withholding from the Patent Office its knowledge of the co-production of tetracycline in the production of Aureomycin;

(l) Opposing Bristol's petition for reconsideration of the Patent Examiner's decision of October 14, 1954.

The Government claims that such actions or steps, or failure to act, were done or refrained from under the terms of the conspiracy alleged in the indictment. The Government is unable to furnish particulars of the said combination and conspiracy with respect thereto other than as furnished in Particular No. 6 above.

16. The Government will make no such claim in this case.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1492

United States of America, Plaintiff-Petitioner, v. Honorable Miles W. Lord, Respondent, and Pfizer, Inc., Bristol Myers Company, American Cyanamid Company, Squibb Corporation, and The Upjohn Company, Defendants-Respondents.	On United States' Petition for a Writ of Prohibition.

Submitted: June 16, 1976

Filed: August 2, 1976

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

PER CURIAM.

The United States petitions[1] this Court for a writ prohibiting Judge Miles W. Lord[2] from (1) discharging [2] the jury panel in the event he should grant mistrial, or (2) discharging any individual juror in connection with any further hearing in relation to respondents' motions for mistrial prior to review by this Court of any order granting the motions.

We refuse to prohibit Judge Lord from discharging the jury panel or from discharging individual jurors, but do prohibit him from transferring the action to another District Court in the event he should declare a mistrial. We also direct that the action be tried and decided promptly.[3]

On July 15, 1969, the United States filed a three-count action against the respondents.[4] Count I is an [3]

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[1]Petition was brought under All Writs Act, 28 U.S.C. §1651 and Rule 21, Fed.R.App.P.

[2]United States District Judge for the District of Minnesota.

[3]This Court has considered matters arising out of this complex litigation on at least nine previous occasions: *Pfizer, Inc. v. International Rectifier Corporation*, Civ. No. 75-1695 (8th Cir., filed June 16, 1976); *Pfizer, Inc. v. The Government of India*, Civ. No. 76-1064 (8th Cir., May 19, 1976); *Pfizer, Inc. v. International Rectifier Corporation*, Civ. Nos. 75-1089 and 75-1187 (8th Cir., March 26, 1975); *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975); *In Re Fish & Neave*, 519 F.2d 116 (8th Cir. 1975); *Pfizer, Inc. v. Inter- national Rectifier Corporation*, Civ. No. 74-1425 (8th Cir., July 26, 1974); *Bristol-Myers Company v. Lord*, Civ. Nos. 73-1284 and 73-1285 (8th Cir., filed May 31, 1973; *Pfizer, Inc. v. Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); *Pfizer, Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972).

[4]This action was originally filed in the District of Columbia. Subsequently, Counts I and II were transferred to the Southern District of New York and consolidated with a number of private antitrust cases filed there. Following a settlement agreement in most

equitable action to cancel the tetracycline patent of Pfizer on the ground that it had perpetrated a fraud on the patent office in procuring the patent, Count II is a common law action of deceit against Pfizer, Cyanamid and Bristol to recover damages incurred by the United States on direct and federally financed purchases of broad spectrum antibiotics resulting from overcharges, and Count III is an action under §4A of the Clayton Act against Pfizer, Bristol, Cyanamid, Squibb and Upjohn to recover damages sustained by the United States on purchases of broad spectrum antibiotics resulting from the unlawful restraint of trade and monopolization in violation of §§1 and 2 of the Sherman Act. The United States claimed damages in excess of $376 million. [4]

On November 25, 1974, Judge Lord commenced trial of the consolidated cases.[5] During the trial, all actions, except

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4 continued.

of the private cases, Judge Lord was designated by Chief Justice Burger to the Southern District of New York to hear the "non-settling" antibiotic cases. These cases were divided into consumer cases, *viz: Mutual of Omaha Ins. Co. v. American Cyanamid Co.*, 4-71 Civ. 6; *Building Service Union Health & Welfare Trust Fund v. Chas. Pfizer & Co., Inc.*, 4-71 Civ. 513; *California Physicians' Service v. Chas. Pfizer & Co., Inc.*,4-71 Civ. 415, and competitor cases, *viz: International Rectifier Corp. v. American Cyanamid Co.*, Civ. 4-74-372; and *Malcolm-Gregg Co., Inc. v. Chas. Pfizer and Co., Inc.*, Civ 4-74-373. On May 14, 1971, pursuant to 28 U.S.C. §1404(a), Judge Lord transferred the New York cases, including the government's case, to the District of Minnesota and consolidated them with cases filed in Minnesota. Subsequently, Count I was transferred directly to the District of Minnesota and consolidated with the other actions for trial.

This Court refused to require Judge Lord to recuse himself from conducting pretrial proceedings or trying the cases. *Pfizer, Inc. v. Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

[5]He caused two twelve-man juries to be selected, one for the competitor cases and one for the consumer cases. *See*

the one brought by the United States, were dismissed following settlement agreements calling for payments by respondents to nongovernmental plaintiffs of approximately $50 million. The last of the settlement agreements was reached in November of 1975 and was formalized and signed in January of 1976.

For reasons not wholly apparent from the record, the trial was virtually discontinued when the last of the nongovernment cases were settled. Since December of 1975, only two days of trial have been held.

On April 6, 1976, the respondents moved for a mistrial of this action contending that: (1) publicity regarding the trial and settlements of the nongovernmental cases prevented a fair trial; (2) certain evidence introduced by the trial plaintiffs was either "irrelevant or collateral to the government's cause of action, and the introduction of massive amounts of [5] evidence on such issues by the other plaintiffs has irreparable prejudiced defendants;" and (3) augmentation of the jury hearing the government's case (a consumer case) by the addition of jurors from the jury hearing the competitors' cases, prejudiced respondents right to a proper jury trial.

On May 17, 1976, the District Court ordered the jurors to report for jury duty on May 25, 1976. The purpose of the recall was to permit the parties "* * * to examine the jury for the purpose of whatever light can be shed upon their ability to go forward as fair and impartial jurors in the light of what (settlements) publicity has transpired."

On May 19, 1976, the respondents filed a contingent motion to transfer this action to the Southern District of New

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n.4, *supra*. The "game plan" was to try the cases together until completion of the evidence in the competitor cases and have the one jury dispose of that case. The "consumer" cases would then go forward with the second jury. The theory was that while the evidence in the competitor cases was common to the consumer cases, the reverse was not true. If the two juries heard the evidence together in the competitor cases, that evidence would not have to be rehashed in separate consumer cases. The plan was an innovative one.

York; the contingency being the granting of a motion for a new trial.

On May 24, 1976, Judge Lord met with counsel for all parties. At that conference, the United States urged him to continue the trial and suggested that the jury be instructed with respect to their duty to disregard any trial-related publicity, as well as their duty to disregard the settlements that had been made. He did not accept this suggestion. He indicated that he would require each juror to be called and interrogated in chambers individually. On May 25, 1976, the jurors were brought into the courtroom where they listened to a preliminary statement. Judge Lord then [6] proceeded to interrogate the jurors individually.[6] As a result of the interrogation, the number on the combined jury was reduced to ten; five remaining from each of the two original juries. [7]

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[6]The government contends that the interrogation was conducted by the court in a manner designed to ensure that a sufficient number of jurors disqualified themselves to require a mistrial. The interrogation of jurors Hedberg and Nesbitt is illustrative of the complained of questioning.

> THE COURT: Now the question is, could you be a better juror as you go into your deliberations if you hadn't heard about this? By that I mean this, defendants are going to call on you and are calling on you to decide they owe nothing.
>
> JUROR HEDBERG: Yes.
>
> THE COURT: That they are, you know, that they deserve a verdict here. Yet you have on one occasion heard about a forty million dollar settlement and you have seen the other people disappearing. That is something that jurors aren't ordinarily exposed to, I suppose. You know that. And the question that I have is would it be easier for you to have been fair and impartial

While the hearing was in process, the government filed a telephonic petition with this Court stating that the District Court's discharge of jurors constituted a [8]

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6 continued.

if you hadn't heard about these things and to really give the defendants a fair shot at being completely exonerated if you hadn't heard already that they paid forty million dollars in several other settlements?

JUROR HEDBERG: I just now, as you told me that is part of the case, I wasn't even, up to now, even sure this is part of this particular case. But, yeah, I don't think–I don't have any problems on that, I guess.

THE COURT: Any problems on what?

JUROR HEDBERG: On seeing them as a potential non-payer at all. In other words, I haven't made up my mind yet on any portion of the case.

THE COURT: The settlements would interfere with your judgments?

JUROR HEDBERG: Not right now.

* * * *

MR. MURPHY (Attorney for respondents): Do you think there would have been a payment of money by one side to the other?

JUROR HEDBERG: I don't know that there has been, really.

MR. MURPHY: No, I am not asking what you know. But do you think that when those settlements were made there would have been a payment by one side to the other?

clear abuse of judicial discretion. It requested an immediate stay on the following grounds: [9]

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6 continued.

JUROR HEDBERG: I would assume that.

The court, out of Juror Hedberg's presence, stated:

I think–this is a very bright juror –he has made up his mind. I don't think that by any interrogation he is going to change his mind. I think
further examination would be superfluous. He is not going to disqualify himself. And he understands the implications of the questions you are asking him as well as you do, and he is just not going to disqualify himself, and that's all there is to it. He is getting paid an extra $25 a day on top of his state wage, and there is no way he is leaving this case.

The court then proceeded to question the next witness with regard to whether she was just interested in serving on the jury out of her own economic interest.

THE COURT: Now, at Honeywell you get paid extra for serving on a jury?

JUROR NESBITT: As of February 1st I will get paid extra, I will. Before that Honeywell paid the difference between the twenty-five dollars here and my day's wage.

THE COURT: As of now you'll be getting paid an extra twenty-five dollars a day over your regular salary?

JUROR NESBITT: That's right.

THE COURT: I suppose you are anxious to serve so that you can get the extra twenty-five dollars, too?

(1) The necessity of preserving the Circuit Court's appellate jurisdiction to review the propriety of the District Court's action in interrogating and erroneously discharging jurors in such a manner that the number of jurors remaining on the panel will fall below the mandatory number of twelve. (Defendants have previously represented that they will not stipulate to a continuation of the trial with a panel of jurors numbering less than twelve.);

(2) In the absence of the stay herein applied for, the United States' right to an appellate review by a petition for a Writ of Mandamus will be irretrieveably lost in that if the number of jurors is reduced to less than twelve and such jurors are finally discharged from duty in this case the possibility of judicial review will be eliminated and it would be required to completely retry this extraordinarily complex and lengthy case, a result that would involve an enormous, unwarranted and wasteful duplication of judicial effort and the time of jurors and counsel and would impose upon the United States very great additional burden;

(3) The United States has twice this date moved the District Court to stay any final

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6 continued.

> JUROR NESBITT: Taxes hit me pretty hard, so it doesn't matter one way or the other. It really doesn't. I have been on it from the beginning, I would like to stay, yes.

The interrogation was improper, particularly insofar as it implied, without foundation, that certain members of the jury failed to disqualify themselves because it was to their economic advantage to continue to serve as jurors. *Cf. Pfizer, Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

discharge of any particular juror until such time as the United States has been afforded an opportunity to seek appellate [10]
review of this decision; these motions have been denied; and

(4) The granting of the stay herein applied for will not serve to prejudice defendants in any way. In connection with this motion, the United States represents that if this stay be granted, it will forthwith seek a Writ of Mandamus from this Court on the grounds that the District Court's action in discharging jurors constitutes a clear abuse of judicial discretion in that there existed no sound legal ground for such discharge and the Court's refusal to give the jurors instructions concerning their obligation to ignore publicity concerning this trial and the fact of settlement and for the further reason that the Court has conducted and presumably intends to continue to conduct the *voir dire* unfairly, improperly, and in such a fashion as to preclude the individual juror's ability to genuinely express their ability to continue to serve in a fair and impartial fashion. If this Court denies this petition for a Writ of Mandamus, the stay will be vacated, the jury discharged, and the defendants afforded a new trial as they now seek.

Following adjournment of the May 25th proceedings, the government advised the Clerk of this Court, by telephone, that the panel had been reduced to ten jurors and that the District Court had refused to stay the unconditional discharge of the remaining jurors.

On May 26th, we denied the petition as moot because the telephonic petition stated that it was necessary to have at least twelve jurors to continue the jury trial. [11]

The government asserts that the matter is not moot. It points out that the local rules required a six-man jury in all civil cases at the time the jury was selected. It argues that since there are more than six jurors remaining, the case may still go forward.

The government also asserts that Judge Lord is determined to end his participation in this case and to do so in a way that precludes effective review by this Court. It suggests that he intends to either discharge at least five more jurors for prejudice and then grant a mistrial for one or more of the reasons stated below and immediately discharge the jury panel. It suggests that, in either event, he will then transfer the case out of Minnesota.

In view of this opinion, we are unwilling to accept the government's theory that Judge Lord will discharge additional individual jurors without good reason. We are equally unwilling to accept its theory that he will grant a mistrial without good reason and then discharge the jury panel to avoid review. Our unwillingness is strengthened by the fact that we cannot say, on the basis of the record before us, that Judge Lord will abuse his discretion if he granted a new trial on one or more of the grounds advanced by respondents, namely: (1) cumulative errors in the admission or rejection of evidence; (2) error in permitting the consumer and competitor juries to be combined into a single jury; and (3) error in permitting the trial to proceed with [12]
less than twelve jurors. Contrarywise, we cannot say at this point on this record that Judge Lord would abuse his discretion by completing the present trial with a consolidated jury with less than twelve.

We must accept the government's contention that it would be a clear abuse of discretion on the part of Judge Lord to transfer this case out of Minnesota or to delay the final disposition of it.

This action had its origins in a 1958 Federal Trade Commission proceeding. It was commenced in 1969 and has been pending since that time. It was assigned to Judge Lord by the Judicial Panel on Multidistrict Litigation on December 7, 1970. The assignment was made with the consent and cooperation of the Chief Judges of the affected circuits. *In Re Antibiotic Drugs*, 320 F.Supp. 586 (1970).

Judge Lord transferred the case to Minnesota on May 14, 1971. Among the reasons he gave for transfer were:

(1) The waiver by the plaintiffs of the original choice of forum.

(2) The lack of showing that any important witnesses would be unavailable or even inconvenienced by the transfer.

* * * * [13]

(3) The fact that each of the defendants had already retained experienced counsel in Minnesota who had been active in the pretrial preparation of these cases.

(4) The fact that the civil docket in Minnesota was the least burdened of any of the eleven districts where the actions had originally been filed.

(5) (B)ecause of the complexity of these cases the interests of judicial efficiency made it highly desirable that the judge who conducted the pretrial proceedings continue as the trial judge(.)

(6) (I)t would be impossible for him to remain in the Southern District of New York for the length of time that these trials were expected to take.

Pfizer Inc. v. Lord, 447 F.2d 122, 125 (2nd Cir. 1971).

The transfer to Minnesota was attacked in the United States Court of Appeals for the Second Circuit as an abuse of discretion. That Court rejected the attack. *See Pfizer Inc. v. Lord*, 447 F.2d 122 (2nd Cir. 1971).

The reasons given by Judge Lord for making the transfer retain their validity. In the ensuing years, the burden on the judges for the United States District Court for the District of Minnesota has significantly increased, but the burdens on the courts to which this case could be transferred have also grown significantly If it were to be retransferred to the Southern

[14]
District of New York, the most recent statistics of the

Administrative Office indicate that it would not likely be reached for trial for at least twenty-five months. If it were retransferred to the District of Columbia, the same statistical source indicates that it would not likely be reached for trial for at least seventeen months. We can countenance delays of this magnitude in a case which was filed more than seven years ago.

There are other reasons why it would be a clear abuse of discretion to transfer this case out of Minnesota. (1) Many of the records and exhibits necessary for trial are now lodged in Minnesota. (2) Judge Lord accepted the responsibility of trying the case. In fulfillment of that responsibility, he expressed such strong disapproval of a tentative settlement of the case that settlement was abandoned.[7] Thereafter, the respondents asked this Court to disqualify Judge Lord for interfering in the settlement. We indicated that a District Judge lacks the power to approve or disapprove any proposed settlement, *Pfizer, Inc. v. Lord*, 456 F.2d 532, 542 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972), but decline to disqualify the judge, feeling that he could and would provide the parties an impartial forum in compliance with his judicial obligations. The situation is now reversed. The nongovernmental cases have been settled, but the government and the respondents have been unable to reach an agreement. One thing, [15] however, remains constant and that is the need to have the case fairly and promptly tried and Judge Lord is clearly in the best position to take that action.

It is for Judge Lord to determine whether it is necessary to declare a mistrial. If he takes this action, it is his responsibility to commence a new trial immediately and to complete it as quickly as possible. If he decides that a mistrial is not required, it is his obligation to reconvene the jury and complete the trial in accordance with the same standard.[8]

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[7] *Pfizer, Inc. v. Lord*, 456 F.2d 532, 540-542 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

[8] We continue to believe that the public interest would be served if the parties reach a fair and just settlement. *See Pfizer, Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

In summary, we refuse to prohibit Judge Lord from discharging individual jurors on the jury panel. We do, however, specifically direct and order him not to transfer this matter to another jurisdiction and direct that the matter be disposed of promptly in accordance with the views set forth in this opinion.

The mandate of this Court shall issue forthwith.

Each party will bear its own costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX O

EXCERPTS FROM ATRR NO. 779 IN RE GOVERNMENT'S ANTIBIOTICS ACTION DISMISSED DUE TO PREJUDICE FROM PUBLICITY ON PRIVATE SETTLEMENTS

"The publicity, length of the trial, the long delays and the introduction of extraneous evidence has created an atmosphere of prejudice which cannot be overcome by instructions or admonishments to the jury," according to the U.S. District Court for Minnesota, in dismissing the Government's action for damages allegedly resulting from collusive behavior among drug companies producing broad-spectrum antibiotics. (U.S. v. Pfizer, Inc., No. 4-71 Civ. 403, D Minn., 8/16/76)

Only two weeks prior to this decision, the Eighth Circuit denied a petition by the Government for a writ prohibiting the trial judge from discharging jurors found prejudiced by publicity on settlements of private actions being tried with the Government case. See 776 ATRR A-10. However, while refusing to prohibit the district court from discharging the jury panel or from discharging individual jurors, the Eighth Circuit barred the trial judge from transferring the action to another district court in the event he had to declare a mistrial for lack of a sufficient number of jurors. The court of appeals also directed, in the event of a mistrial, that the action be set for trial again and decided promptly.

Noting that it is the court's "duty to assure that the jury decides the case upon the facts and evidence before it, rather than upon extraneous material no matter where it is from or how it has come to the attention of the jury," Judge Lord points out that the jurors "are only human and cannot be expected to do better than the court in a trial of this longevity in sorting out the issues and trying to remember the evidence as presented over the last one and a half years."

Since the court can see "no end in sight" to the trial, it is especially concerned over the effect on the jurors of all the evidence on issues unrelated to the Government action which had already been submitted in the consolidated private actions that were settled. This collateral evidence will delay the trial even more since the defendants will want to rebut it, and the evidence "will create more confusion for the jury, thereby creating a greater likelihood of a verdict based on the jury's knowledge of the other settlements, and their amounts." Thus, the court "believes that with a fresh start, each side could narrow the issues to only those involved in the Government case and proceed to expeditious resolution."

The court attaches 42 exhibits of newspaper articles and television newscast transcripts to its opinion and states that "(m)ore than fifty stories about the trial, settlements, and appeals in a year and a half is certainly sufficient to cause doubts about the objectivity in the mind of any juror." Noting that five jurors indeed admitted to prejudice resulting from the publicity, the court observes that it "is not required to wait until the jurors express actual prejudice created by outside influence, nor should it delve into their minds to determine if it is there. As long as there is sufficient extraneous influence to create a good possibility of interference, the court must consider the problem."

Two-Jury Innovation

The aborted trial had been proceeding before two juries sitting at the same time in two separate jury boxes—one for competitor cases and one for the Government case and purchaser cases.

When all but one competitor case had been settled, the court was prepared to combine the two juries into one, a course of action that became more necessary after five jurors had to be dismissed after admitting prejudice.

Now, the court "rejects in its entirety the argument of the defendants that the combining of (the two juries) was prejudicial or denied them their right to a fair trial by jury." Since the action is dismissed, the court does not "dwell" on this argument by the defendants; it notes, however, that "the two-jury system, although novel, was fair and expeditious. Without the two juries, the court believes that it would be faced with the possibility of at least five more years of trials with plaintiffs who have now settled. The court believes the two-jury system did work and can and should be used in future multi-party litigation."

Parting Shot

Judge Lord apparently remains sensitive over criticism from the Eighth Circuit in 1971 regarding his questioning of the propriety of the Government's offer to settle its case for $14.5 million. In addition to noting that he was critical of proposed dismissal of equitable claims rather than the dollar amount of the settlement, Judge Lord states that "(i)f the court of appeals had known that the proposed settlement figure of Attorney General (John) Mitchell would be increased by over nine times, this court might have been spared some of that criticism."

Judge Lord continues: "The amount that the Government settles for has never been a concern of this court. The fact that the Government was willing to settle at one time for just money, and abandon the equitable and other policy provisions of this case, appalled the court in 1971 and under the same circumstances would appall the court today."

He notes that since the settlement was refused, "over $130 million in additional settlement monies has been paid by the defendants in cases before this court," representing "almost a million dollars a day for trial time. Most of this money was paid over to classes and subsequently distributed to the claimants

in each individual class. The (Government) has helped to lead the way, through its persistent discovery and tenaciousness in the production of documents, etc. for the other plaintiffs in this case."

Although "disappointed that it must declare a mistrial after so much work," the court concludes that "it can only look back and reflect that in terms of disposal of total number of claims the trial has been a worthwhile endeavor." In any event "(n)ow that the other plaintiffs have settled, all of the documents are in, and all important discovery is completed, the parties, with a fresh start, should be able to try this case in a significantly shorter period of time."

APPENDIX "P"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-1064

Pfizer, Inc., et al.,	*	
	*	
Appellants,	*	Appeal from the United
	*	States District Court
	*	for the District of
	*	Minnesota.
The Government of India, et al.,	*	
	*	
	*	
Appellees.		

Submitted: August 27, 1976

Filed: September 3, 1976

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, WEBSTER and HENLEY, Circuit Judges, *en banc*.

PER CURIAM.

The original panel opinion filed on May 19, 1976, is adopted by the court. Chief Judge Gibson and Judge Webster also join in Judge Ross' concurring opinion.

The judgment of the district court is ordered affirmed.

BRIGHT and HENLEY, Circuit Judges, dissenting:

This case presents the question of whether foreign sovereigns are "persons" entitled to sue for treble damages under S4 of the Clayton Act (15 U.S.C. Sec. 15). As the majority opinion acknowledges, two Supreme Court decisions provide the only instances in

which similar questions have been considered. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court ruled that the United States was not a "person" entitled to sue for treble damages under the antitrust laws. In *Georgia v. Evans*, 316 U.S. 159 (1942), the Court held that Congress did intend the states to be such "persons." We believe that *Cooper is* the proper guide for decision of the instant case.

It seems anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *Id.* at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act.

Congress made no express provision for foreign governments, nor is there any evidence that Congress considered granting a foreign government the right to sue for treble damages. Judge Ross in a separate concurrence (joined by Chief Judge Gibson and Judge Webster) appropriately observed that Congress "gave no consideration or did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." (Slip op. at 8.) The *Cooper* Court stated:

> (I)t is not our function to engraft on a statute additions which we think the legislature logically might or should have made. (312) U.S. 605).

The judiciary ought not to add foreign governments to the "person" class without a clear Congressional intent to do so.

The majority opinion reasons that because *Georgia v. Evans, supra,* authorizes a state of the United States to bring treble damage suits as a "person" under the Clayton Act, that, therefore, foreign sovereigns must also be granted the right to sue. We do not agree with the logic of such conclusion.

The *Evans* Court reasoned that Congress intended that a State be deemed a person authorized to sue for treble damages for otherwise it would have no redress for antitrust violations; that no reason exists for believing that Congress wanted to deny a State this remedy, and, finally, that because it already had been held that municipalities, which are subdivisions of States, were entitled to such remedy, that such remedy should be afforded the State. The majority finds "the same reasoning (is) applicable to a foreign sovereign" (Slip op. at 7.), we cannot agree. States and municipalities of these United States are not analogous to foreign sovereigns. Certainly Congress would face different or additional policy questions in deciding whether foreign sovereigns should be authorized to sue a domestic corporation for treble damages.

The majority has concluded that in light of *Evans,* "Congress intended other bodies politic, such as a foreign government, to enjoy the same right." (Slip op. at 7.) If this conclusion rests upon Congressional intent, the analysis is tenuous at best. If this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term "person," the definition of "person" should now be even further expanded, then the majority has adopted a questionable principle of statutory construction.

The arguments and briefs of the parties demonstrate that the issue of granting an antitrust remedy to foreign governments presents complex matters relating to international trade and foreign policy. We

note that many foreign countries foster monopolistic practices as a matter of government policy. For example, Iran, one of the plaintiffs-appellees, belongs to the cartel of the Organization of Petroleum Exporting Countries (OPEC). Granting such sovereigns the right to sue American companies for treble damages will not diminish their own restraint of trade. Nevertheless, plaintiffs-appellees, and the United States, as *amicus curiae*, argue that granting foreign sovereigns the right to sue under the antitrust laws will assure effective enforcement of those laws. Furthermore, the United States declares that granting such a right will "assure optimum financial efficiency in the allocation of American dollars sent abroad." (Amicus br. at 5.) Whether these and other policy considerations will be best implemented by authorizing a foreign government to recover treble damages for antitrust violations is a determination which Congress should make.

The Supreme Court has cautioned restraint on the part of the judiciary in expanding the scope of the Clayton Act beyond statutory language without a clear expression of Congressional purpose. *See, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 202 (1974); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972). We would heed that caution and reverse the district court.

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